

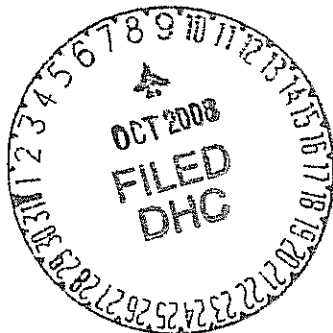
STATE OF NORTH CAROLINA

COUNTY OF WAKE

In the Matter of:

Petition for Reinstatement of

GENE H. KENDALL



BEFORE THE DISCIPLINARY
HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR

PETITION FOR REINSTATEMENT

08 BCR 2

COMES NOW the Petitioner, Gene H. Kendall, pursuant to Article IX, Section 25(A) of the Rules and Regulations of the North Carolina State Bar, and petitions for reinstatement of his license to practice law in the State of North Carolina. In support of this Petition, the Petitioner respectfully shows as follows:

(1) Pursuant to an order entered by the Disciplinary Hearing Commission of the North Carolina State Bar on December 29, 2000 and effective 30 days after service of the order (Service was on March 15, 2001.) There was a request for review which was denied on May 4, 2001. The petitioner was disbarred from the practice of law in North Carolina. A copy of the Findings of Fact, Conclusions of Law and Order of Discipline in said case is a part of the official records in this case, is in the possession of the N. C. State Bar, and is referenced herein as though set out word for word at this point.

(2) Petitioner has not been able to return his license as required in his disbarment order, because that document had been placed in storage and lost when everything so stored was taken and given away or destroyed because the petitioner was unable to pay rent on the storage unit. Petitioner avers that he had no office and did not display said license at any time from at least 1995 to the present. Specifically, Petitioner avers that he does not have possession of the license and had not displayed it in any fashion during the time of his disbarment. During this period the petitioner has not maintained an office for any purpose and has not engaged in the practice of law. For a number of years prior to the petitioner's disbarment he had made a request for a duplicate NC State Bar Id card each year when he paid his Bar dues. None was supplied.

(3) Petitioner requested publication of a notice of intent to seek reinstatement in an official publication of the North Carolina State Bar, as required by Article IX, Section 25(A)(3)(b) of the Rules and Regulations of the North Carolina State Bar. This notice was published in the June edition of said publication.

(4) Petitioner is in substantial compliance with the requirement for continuing education in that:

(A) During the first week of July, 2007 he attended and completed a very fine CLE program designed and tailored specifically to meet the needs of professional secondary school teachers of economics. This was a thirty-five hour course taught by an outstanding faculty, each of whom was highly placed in institutions of higher education. Attendees were permitted, upon submission of a paper and payment of fees, to receive either undergraduate or two units of graduate level credit from the University of Colorado at Colorado Springs for this course. The faculty for this program included Dr. Lee Craig of the University of North Carolina at Chapel Hill, Dr. John Wallace of the University of Maryland, and Robert Whaples of Wake Forest University. No academic credit was requested for the applicant's participation in this course. CLE credit was requested of the N. C. State Bar for this course and was initially denied for the stated reason that "economics is not relevant to the practice of law". Upon appeal for review the credit was denied, not for the previously stated reason, but because CLE credit may not be allowed for studies leading to other credits or certifications. This denial of credit was for a reason never raised with your petitioner and was announced as final. It is fair to note that this petitioner was NOT seeking any academic credits and was not trying to qualify for any other career. The petitioner sought only to become better prepared to serve his clients, who would in many cases have no other professional upon whom to lean for economic advice. Perhaps the committee reviewing this petition for reinstatement will find it possible to credit these hours for this purpose, whether or not the hours would have been credited for CLE for a practicing attorney in North Carolina. Such an attorney, however, could do no better than to attend such a program.

(B) During 2006 the petitioner attended a seminar in Greensboro, NC for which it is believed 12 hours of CLE credit was earned. Record of this course has been lost along with most of the files and records of the petitioner, and along with the petitioner's license to practice law, his graduation certificates from college and law school, his certificate of membership on the editorial board of the Walter F. George Law Review, his two published case notes and his Am Jur Award in real property law.

(C) During early 2007 the petitioner audited the last day (Sunday) of a CLE program at Pinehurst at which the topic was bankruptcy. The petitioner was unable to pay the tuition for this course and was not allowed CLE credit.

(D) In 2007 the petitioner attended a 12 hour CLE presentation in Charlotte which was in a format intended to introduce new lawyers to the practical skills needed as they began their professional career. Credit was awarded for these hours.

The petitioner would like to attend the next available course in the nature of a review of recent changes in the law.

(5) There were no client complainants in the disciplinary proceeding which led to the disbarment of the petitioner. In fact, two of the three individuals allegedly harmed by the petitioner provided affidavits in support of the petitioner at the time of the disbarment proceeding. The third was a death estate and there was, obviously, no input from the deceased. This was a "money" case in which funds in three cases had been commingled with the Petitioner's personal funds. No funds were missing, no restitution was ordered, no laws were broken, and no client complained. Nevertheless, the Petitioner did write the two surviving individuals whose funds were mishandled by the Petitioner a copy of the Notice to Seek Reinstatement which was published. Copies of the two letters of notification, with proof of delivery, will be supplied to the N.C. State Bar and offered as exhibits to this petition. Each of these clients has sent a supporting letter to the N.C. State Bar with regard to petitioner's petition for reinstatement.

(6) Petitioner has learned a very expensive lesson from this experience, determined to be very sure such misconduct is not repeated, and presently possesses the moral, intellectual and academic qualifications required for admission to practice law in the State of North Carolina.

(7) Petitioner's resuming the practice of law within the State of North Carolina will be neither detrimental to the integrity and standing of the Bar, nor the administration of justice, nor subversive of the public interest. Petitioner acknowledged at the disbarment hearing his violation of the Bar rule prohibiting commingling of client with attorney funds and both was and remains remorseful about his misconduct.

(8) Petitioner has not engaged in the unauthorized practice of law during the period of his disbarment.

(9) Petitioner has not engaged in any conduct during the period of his disbarment constituting ground for discipline under N.C.G.S. Section 84-28(b) and does not have on his life record

conviction of any offenses other than minor traffic violations which are now denominated "infractions".

(10) Petitioner possesses knowledge and understanding of the current Rules of Professional Conduct.

(11) Petitioner possesses the competency and learning in the law required to practice law in the State of North Carolina.

(12) Petitioner has complied with all applicable orders of the Disciplinary Hearing Commission and of the Council, except that he has not returned his license to practice law or his NC State Bar membership card. The petitioner possesses neither of these items. The license was never posted after the petitioner's Charlotte office was closed and the Attorney's Building destroyed to make way for the new Mecklenburg County Jail in 1987. The membership card was lost and a replacement card was requested annually for several years prior to the petitioner's disbarment, when the petitioner's Bar dues were paid. The card was never replaced.

WHEREFORE, Petitioner prays:

(1) That the Chairman of the Disciplinary Hearing Commission appoint a Hearing Committee to hear this Petition for Reinstatement, as provided in Article IX, Section 8(A)(2) of the Rules of the North Carolina State Bar and schedule a time and place for said hearing as soon as reasonable.

(2) That, after hearing and considering the evidence presented at said hearing, the Hearing Committee file a report recommending to the Council of the North Carolina State Bar the restoration and reinstatement of the Petitioner's license to practice law in the State of North Carolina.

(3) That the Council of the North Carolina State Bar, after reviewing the report of the Hearing Committee and the record of said hearing, enter an Order restoring and reinstating the Petitioner's license to practice law in the State of North Carolina.

VERIFICATION

GENE H. KENDALL, being first duly sworn, deposes and says:

That he is the Petitioner in the above-entitled matter; that he prepared and has read the foregoing Petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matter and things therein stated upon information and belief, and, as to those matters and things, he believes them to be true.

Gene H. Kendall

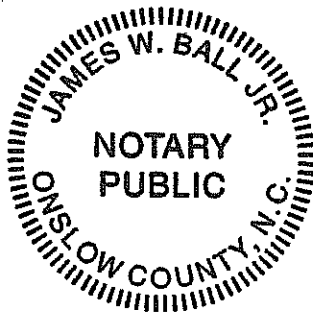
GENE H. KENDALL

Sworn to and subscribed before me,
this 6 day of OCTOBER, 2008

James W. Ball Jr.
Notary Public

My Commission Expires: JAN. 31, 2011

(Seal)



Petitioner certifies that the attached (or copied) return receipts are from mailings of the published "Notice of Intent to Petition for Reinstatement" of the petitioner. Petitioner further avers that each of those so addressed has mailed a supporting response to the NC State Bar, conclusively demonstrating effective notice as well as each individuals continuing support of the petition.

Gene H. Kendall

Gene H. Kendall, Petitioner

7008 0150 0001 3136 7176

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<input checked="" type="checkbox"/> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. <input checked="" type="checkbox"/> Print your name and address on the reverse so that we can return the card to you. <input checked="" type="checkbox"/> Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature <input checked="" type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee <i>W. Garrison</i>	
1. Article Addressed to: WILLIAM GARRISON 4845 TROUT RIVER CROSSING ELIXTON, FL 34222		B. Received by (Printed Name) W. GARRISON	C. Date of Delivery 8-22-08
2. Article Number (Transfer from) 7008 0150 0001 3136 7176		D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
PS Form 3811, February 2004		Domestic Return Receipt	

U.S. Postal Service TM	
CERTIFIED MAIL TM RECEIPT	
(Domestic Mail Only. No Insurance Coverage Provided)	
Official Use	
Return Receipt Fee (Endorsement Required) Restricted Delivery Fee (Endorsement Required) Postage Certified Fee Total Postage & Fees	
Postmark Here AUG 19 2008 SURF CITY, NC	

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<input checked="" type="checkbox"/> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. <input checked="" type="checkbox"/> Print your name and address on the reverse so that we can return the card to you. <input checked="" type="checkbox"/> Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature <input checked="" type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee <i>Dr. Mack King</i>	
1. Article Addressed to: DR. MACK KING 631 HEATHERLY RD. MOORESVILLE, NC 28115		B. Received by (Printed Name)	C. Date of Delivery
2. Article Number (Transfer from service label) 7008 0150 0001 3137 9254		D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
PS Form 3811, February 2004		Domestic Return Receipt	

U.S. Postal Service TM	
CERTIFIED MAIL TM RECEIPT	
(Domestic Mail Only. No Insurance Coverage Provided)	
Official Use	
Return Receipt Fee (Endorsement Required) Restricted Delivery Fee (Endorsement Required) Postage Certified Fee Total Postage & Fees	
Postmark Here AUG 19 2008 SURF CITY, NC	

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 A STATE BAR

THE NORTH CAROLINA STATE BAR

v.

Defendant.

COMPLAINT

PENGAD-Bayonne, N. J.

**PLAINTIFF'S
EXHIBIT**

1

1. Plaintiff, the North Carolina State Bar, is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar promulgated thereunder.

2. Defendant, Gene H. Kendall (hereinafter, "Defendant"), was admitted to the North Carolina State Bar in 1968 and is, and was at all times referred to herein, an attorney at law licensed to practice law in North Carolina, subject to the rules, regulations and Revised Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. During the periods referred to herein, Defendant was engaged in the practice of law in North Carolina and maintained a law office in Davidson, Mecklenberg County, North Carolina.

~~Upon information and belief, Plaintiff alleges:~~

FIRST CLAIM FOR RELIEF – MISAPPROPRIATION OF BACON ESTATE FUNDS

4. Paragraphs 1 – 3 are realleged and incorporated by reference as if fully set forth herein.

5. On September 17, 1997, Defendant qualified as executor of the Estate of Rosalie Bacon.

6. As executor of the Bacon Estate, Defendant opened a bank account for the Estate at First Citizens Bank, designated Account Number 0131434338 (hereafter, “Bacon Estate Account”).

7. On February 23, 1998, Defendant endorsed and deposited into his personal account at First Citizens Bank, Account Number 137828693 (hereafter, the “Personal Account”) two checks payable to the Estate of Rosalie Bacon from Charlotte Psychiatric Associates in the total amount of \$243.86 (hereafter, the “Bacon Estate Funds”).

8. After February 23, 1998 Defendant should have retained \$243.86 on deposit at all times for the benefit of the Bacon Estate.

9. During the period from February 23, 1998 to June 2, 1998, the Defendant's Personal Account balance repeatedly fell below \$243.86.

10. On June 2, 1998, Defendant's Personal Account had a negative balance.

11. Throughout the period February 23, 1998 to June 2, 1998, Defendant used the funds in his Personal Account for personal expenditures.

12. On June 25, 1999, Defendant made a deposit of his personal funds in the amount of \$360.50 into the Bacon Estate Account.

13. Defendant deposited his personal funds into the Bacon Estate Account for the purpose of correcting an error that he believed he had made in a prior deposit of funds payable to the Bacon Estate from the Methodist Home.

14. In actuality, Defendant had made no error in the prior Methodist Home deposit.

15. Defendant mishandled the Bacon Estate Funds entrusted to him by depositing the funds into his Personal Account on February 23, 1998, instead of depositing the funds into the Bacon Estate Account or into a trust account, as required by the Revised Rules of Professional Conduct.

16. Defendant misappropriated the Bacon Estate Funds by depositing the funds into his Personal Account on February 23, 1998 and by using the funds for personal expenditures.

17. Defendant's actions were intentional and willful. In the alternative, Defendant was grossly negligent in the handling of fiduciary funds or acted in reckless disregard of his obligations under the North Carolina Rules of Professional Conduct.

THEREFORE, the Plaintiff alleges that Defendant's foregoing conduct constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that:

- (a) By appropriating to his own use the Bacon Estate Funds that he received in a fiduciary capacity, Defendant committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 1.2(b) of the Rules of Professional Conduct;
- (b) By appropriating to his own use the Bacon Estate Funds that he received in a fiduciary capacity, Defendant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 1.2(c) of the Rules of Professional Conduct; and
- (c) By failing to preserve the Bacon Estate Funds that he received in a fiduciary capacity separate and apart from his own funds in a trust or fiduciary account, Defendant violated Rules 10.1(a) and 10.1(c) of the Rules of Professional Conduct.

SECOND CLAIM FOR RELIEF – MISAPPROPRIATION OF CHILUCK FUNDS

18. Paragraphs 1 – 17 are realleged and incorporated by reference as if fully set forth herein.

19. Defendant formerly maintained a trust account at United Carolina Bank (now known as BB&T), Account Number 5216583347 (hereafter, the “Old Trust Account”).

20. Defendant’s Old Trust Account was closed on July 16, 1998.

21. Defendant represented Arthur Chiluck in a personal injury claim.

22. On July 21, 1998, Mr. Chiluck reviewed and signed a settlement statement prepared by Defendant (hereafter, the “Chiluck Settlement Statement”).

23. A true and accurate copy of the Chiluck Settlement Statement is attached hereto and incorporated by reference as Exhibit 1.

24. The Chiluck Settlement Statement shows a total recovery for the benefit of Mr. Chiluck in the amount of \$3,200.00.

25. The Chiluck Settlement Statement also shows that Defendant retained \$1,283.00 of the settlement funds on behalf of Mr. Chiluck for payment of medical bills owed by Mr. Chiluck to Dr. King of King Chiropractic Clinic.

26. The Chiluck Settlement Statement shows that Defendant received \$1,066.00 of the settlement funds as his attorney’s fee.

27. On July 21, 1998, Defendant disbursed to Mr. Chiluck the remaining balance of the settlement funds in the amount of \$850.34 by check number 1532 issued from Defendant’s Personal Account.

~~28. On July 22, 1998, Defendant endorsed a check made payable to “Arthur Chiluck and His Attorney Gene H. Kendall” from Nationwide Insurance Company in the amount of \$3,200.00 and deposited the check into his Personal Account.~~

29. Upon deposit of the Chiluck settlement check into his Personal Account, Defendant simultaneously withdrew \$1,000.00 in cash.

30. On September 8, 1998, Defendant paid to King Chiropractic Clinic \$1,283.00 in cash in full payment of Mr. Chiluck’s outstanding medical bill.

31. Between July 22, 1998 when Defendant deposited the Chiluck settlement check into his Personal Account and September 8, 1998 when Defendant paid King Chiropractic Clinic, Defendant should have retained \$1,283 on deposit at all times for the benefit of Mr. Chiluck.

32. On July 30, 1998, the balance in Defendant’s Personal Account fell below \$1,283.00 and remained below \$1,283.00 up to and including September 8, 1998.

33. Between July 22, 1998 when Defendant deposited the Chiluck settlement check into his Personal Account and September 8, 1998 when Defendant paid King Chiropractic Clinic, Defendant's Personal Account balance fell as low as \$1.96.

34. On September 4, 1998, Defendant had only \$51.83 in his personal account.

35. On September 8, 1998, the same day that he paid Dr. King \$1,283.00 in cash, Defendant deposited \$200.00 in cash into his Personal Account.

36. Between July 22, 1998 and September 8, 1998, Defendant used the funds in his Personal Account for personal expenditures.

37. Defendant mishandled the settlement funds belonging to Mr. Chiluck by depositing the funds into his Personal Account, instead of depositing the funds into a trust account, as required by the Revised Rules of Professional Conduct.

38. Defendant misappropriated Mr. Chiluck's settlement funds in the amount of \$1,283.00 by depositing the funds into his Personal Account on July 22, 1998 and by using the funds for personal expenditures.

39. Defendant's actions were intentional and willful. In the alternative, Defendant was grossly negligent in the handling of client funds or acted in reckless disregard of his obligations under the North Carolina Revised Rules of Professional Conduct.

THEREFORE, the Plaintiff alleges that Defendant's foregoing conduct constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that:

- (a) By appropriating to his own use the Chiluck settlement funds that he received in a fiduciary capacity, Defendant committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 8.4(b) of the Revised Rules of Professional Conduct;
- (b) By appropriating to his own use the Chiluck settlement funds that he received in a fiduciary capacity, Defendant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c) of the Revised Rules of Professional Conduct;
- (c) By failing to promptly pay or deliver to King Chiropractic Clinic settlement funds belonging to Mr. Chiluck for medical expenses owed, as directed by Mr. Chiluck in the Chiluck Settlement Statement, Defendant violated Rule 1.15-2(h) of the Revised Rules of Professional Conduct; and
- (a) By failing to preserve the Chiluck settlement funds that he received in a fiduciary capacity separate and apart from his own funds in a trust or fiduciary account, Defendant violated Rules 1.15-1(a) and 1.15-1(d) of the Revised Rules of Professional Conduct.

THIRD CLAIM FOR RELIEF – COMMINGLING/
FAILURE TO MAINTAIN TRUST ACCOUNT

40. Paragraphs 1 – 39 are realleged and incorporated by reference as if fully set forth herein.

41. On April 6, 1999, Investigator David Frederick of the North Carolina State Bar personally served a subpoena for cause audit on Defendant, commanding him to produce for inspection, copy and audit all records relating to his handling of client funds that he was required to keep pursuant to the Rules of Professional Conduct, Rules 10.1 and 10.2, and/or the Revised Rules of Professional Conduct, Rules 1.15-1 and 1.15-2.

42. At the time the subpoena for cause audit was served on him, Defendant explained that he had not maintained a trust account for deposit of client or fiduciary funds since his Old Trust Account was closed on July 16, 1998.

43. On information and belief, Defendant opened a new trust account (hereafter, “the New Trust Account”) in or around June 1999 in response to the State Bar’s investigation.

44. On information and belief, during the period from July 16, 1998, to June 1999, Defendant did not maintain any trust account for the deposit of client or fiduciary funds.

45. Prior to and during the period when he did not maintain a trust account, Defendant deposited funds that he received from clients and third parties in his capacity as an attorney or fiduciary into his Personal Account. Such funds included, but were not limited to, the Bacon Estate Funds and the Chiluck settlement funds, as previously alleged.

46. On June 30, 1998, Defendant deposited into his Personal Account settlement funds in the amount of \$572.00 that he received from Laker Express on behalf of his clients, Garrison Management and Portside Homeowners’ Association.

47. Defendant was entitled to an attorney’s fee equal to one-third of the settlement amount or \$190.66.

48. On July 3, 1998, Defendant disbursed \$381.34 of the settlement funds to Portside Homeowners’ Association, an amount equal to the settlement proceeds less his attorney’s fee.

49. Defendant has stated that, from time to time after his Old Trust Account was closed on July 16, 1998, he also kept client or fiduciary funds in his pocket or otherwise within his personal possession, custody or control.

50. Defendant’s actions were intentional and willful. In the alternative, Defendant was grossly negligent in the handling of client funds or acted in reckless disregard of his obligations under the North Carolina Revised Rules of Professional Conduct.

THEREFORE, the Plaintiff alleges that Defendant’s foregoing conduct constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that:

- (a) By commingling client and fiduciary funds with his personal funds when he repeatedly deposited client and fiduciary funds into his Personal Account,

Defendant violated Rule 1.15-1(a) of the Revised Rules of Professional Conduct;

- (b) By failing to maintain a trust account, separately identifiable from any business or personal account, as a prerequisite to the receipt of funds belonging to another person or entity from a client or a third party, Defendant violated Rule 1.15-1(c) of the Revised Rules of Professional Conduct; and
- (c) By failing to deposit all funds received from a client or third party, to be delivered in all or in part to a client, into a trust account, Defendant violated Rule 1.15-1(d) of the Revised Rules of Professional Conduct.

FOURTH CLAIM FOR RELIEF - NEGLIGENCE

51. Paragraphs 1 – 50 are realleged and incorporated by reference as if fully set forth herein.

52. Rosalie Felicia Bacon died on June 25, 1996.

53. Ms. Bacon's last will and testament was probated on September 17, 1997.

54. At the same time, Defendant applied to be executor of the Bacon Estate and completed a preliminary inventory. He also filed inventories of the contents of two safety deposit boxes.

55. Defendant qualified as the executor for the Bacon Estate pursuant to the terms of Ms. Bacon's last will and testament and the Mecklenberg County Superior Court issued letters testamentary to Defendant on September 17, 1997.

56. Defendant signed the Oath of Executor on September 17, 1997.

57. After Defendant qualified as executor, he set up a separate estate account and collected the funds held in trust for Ms. Bacon at First Citizens Bank. He also paid bills of the Estate.

58. On October 6, 1997, Defendant filed a 90-day inventory for Bacon's estate and a verified petition for interim fees for executor.

59. The verified petition for interim fees sought payment of Defendant's fees as executor in the amount of \$2,212.50.

60. The Clerk of Mecklenberg County Superior Court entered an order allowing compensation of Defendant as executor of the Bacon Estate in the amount of \$2,212.50.

61. On October 31, 1997, Defendant filed an affidavit of publication, which affirmed that the notice of administration of the Bacon Estate had been published.

62. On November 10, 1997, Defendant filed a second verified petition for interim fees for serving as executor.

63. The second petition for interim fees sought payment of Defendant's fees as executor in the amount of \$2,125.00.

64. The second petition for interim fees included a statement of Defendant's time incurred in administering the Bacon Estate.

65. The statement of Defendant's time incurred in administering the Bacon Estate included an entry for 5.0 hours for preparation of NC State Inheritance Tax Return for the Estate and preparation of an income tax return for the decedent for the tax year 1996.

66. On November 10, 1997, the Clerk of Mecklenberg County Superior Court entered an order allowing compensation of Defendant as executor of the Bacon Estate in the amount of \$2,125.00.

67. Subsequently, there was no activity in the file until September 18, 1998, at which time the Clerk of Mecklenberg County issued a Notice to File Annual Account.

68. Pursuant to this Notice to File Annual Account, Defendant was advised that he must file an annual accounting on behalf of the Bacon Estate no later than October 18, 1998.

69. The Notice to File Annual Account was served on Defendant by certified mail on September 22, 1998.

70. Defendant did not file an Annual account for the Bacon Estate by October 18, 1998.

71. The Mecklenberg County Clerk spoke with Defendant on October 27, 1998 and informed him that, if he had not filed an accounting by November 13, 1998, the clerk's office would issue an order to file an accounting and would send a copy of the order to the North Carolina State Bar.

72. On November 16, 1998, Defendant requested an extension of time to file an Annual Account and the Clerk of Mecklenberg County granted an extension to November 19, 1998.

73. Thereafter, Respondent failed to file an annual accounting or inventory.

74. On December 4, 1998, the Assistant Clerk of Superior Court, Kathy Allen Smith, issued an order for Defendant to file an accounting in the Bacon Estate.

75. Pursuant to the Order, Respondent had to and until December 24, 1998 to file an annual account or to show good cause as to his failure to do so.

76. Three attempts to serve the December 4, 1998 order on Defendant by certified mail were made, but the certified mail delivery was not claimed by Defendant.

77. Defendant did not file an annual inventory or account for the Bacon Estate and did not make the required showing.

78. Defendant did not seek another extension of time to file an annual account.

79. By order dated January 8, 1999, the Mecklenberg County Clerk removed Defendant as executor of the Bacon Estate and the letters testamentary were revoked.

80. The Clerk found as fact that Defendant "failed to properly administer the estate . . . in that he has failed to file his Account as required by law."

81. The Clerk found as fact that the Court had taken actions in an attempt to have Defendant correct the deficiencies in that:

- (a) Assistant Clerk Kathy Allen Smith talked by telephone with Defendant on several occasions and each time was advised by Defendant that he would file his Account;
- (b) Ms. Smith advised Defendant that if he had not filed his Account by November 13, 1998, the Court would issue an order to file his Account;
- (c) On December 4, 1998, the Court issued an order and directed Defendant to file his Account as required by law which order the Court attempted to serve on Defendant by certified mail, return receipt requested;
- (d) The wrapper containing the order to file was returned to the Court;
- (e) The wrapper discloses that notices to pick up the certified mailing were given to the addressee on December 8, December 18, and December 23, 1998.
- (f) The mail was not picked up by Defendant and the post office returned it to the Court with the notation that it was "unclaimed."

80. The public administrator, Frank Schrimsher, was appointed as Successor Personal Representative for the Bacon Estate on January 8, 1999.

81. Defendant was ordered to immediately turn over to the public administrator all assets of the Bacon Estate and all records pertaining to administration of the Estate.

82. On January 12, 1999, the Successor Personal Representative, Mr. Schrimsher, filed a petition for discovery of property belonging to the Bacon Estate.

83. By notice of hearing dated January 12, 1999, Defendant was ordered to appear before the Clerk of Superior Court of Mecklenberg County on February 16, 1999, to be examined under oath concerning his possession of certain property belonging to the Estate.

84. On January 26, 1999, Assistant Clerk of Court Kathy Allen and Mr. Schrimsher met with Defendant regarding the Bacon Estate.

85. At their January 26, 1999 meeting, Ms. Allen and Mr. Schrimsher pointed out to Defendant that his verified petition for payment of executor fees stated that he had spent 5.0 hours at \$125.00 per hour preparing inheritance tax returns for the Estate and personal income tax returns for Ms. Bacon.

86. Defendant's fee for preparing the tax returns in the amount of \$625.00 had been paid by the Estate.

87. Ms. Allen and Mr. Schrimsher asked Defendant whether the tax returns had been filed.

88. Defendant admitted that he did not file the tax returns.

89. Defendant did not produce to Ms. Allen or Mr. Schrimsher any tax returns prepared by him for the Estate or for Ms. Bacon.

90. At the January 26, 1999 meeting with Ms. Allen and Mr. Schrimsher, Defendant filed an affidavit with the Court describing the assets in the Estate at the time of Ms. Bacon's death and the actions that he had undertaken as executor up to and including January 8, 1999, when he was removed as executor by order of the Court.

91. Defendant attached to his affidavit filed on January 26, 1999, a list of checks payable to the Bacon Estate and a list of checks paid from the Bacon Estate Account.

92. At the January 26, 1999 meeting with Ms. Allen and Mr. Schrimsher, Defendant promised to turn over records for the Estate as soon as he received them from the bank and promised to prepare a final account.

93. The Assistant Clerk of Court, Ms. Allen, gave Defendant an extension of 7 – 10 days to turn over the Estate records and to prepare an account.

94. Defendant did not turn over the documents or file an account.

95. On May 11, 1999, the Court issued a Notice of Hearing and scheduled a hearing on May 27, 1999, for purposes of determining the Defendant's attorney's fee.

96. Defendant met with Mr. Schrimsher and Assistant Clerk of Court, Martha Curran, on May 27, 1999.

97. At that meeting, Defendant returned \$650.00 to the Estate in reimbursement for the \$625.00 in fees paid to him for preparing the tax returns that were never filed and were never turned over to the new administrator.

98. On October 6, 1999, Defendant finally filed a Final Account for the Bacon Estate.

THEREFORE, the Plaintiff alleges that Defendant's foregoing conduct constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that:

- (a) By failing to act with reasonable diligence and promptness in completing the statutorily required estate filings and tasks, Defendant neglected his duties and obligations as executor of the Bacon Estate in violation of Rule 1.3 of the Revised Rules of Professional Conduct; and
- (b) By unduly delaying the estate proceedings and by failing to respond to and abide by the orders of the Superior Court relating to administration of the estate, Defendant engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) of the Revised Rules of Professional Conduct;
- (c) By submitting a petition for fees for preparation of tax returns for the Bacon Estate and for Ms. Bacon and by collecting a fee for such services when he did not complete the services on behalf of the Estate and when he could not produce

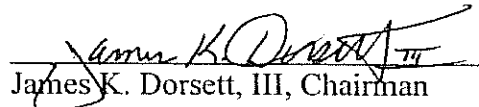
the tax returns to the clerk or the successor personal representative, Defendant knowingly made a false statement of material fact or law to a tribunal in violation of Rule 3.3(a) of the Revised Rules of Professional Conduct.

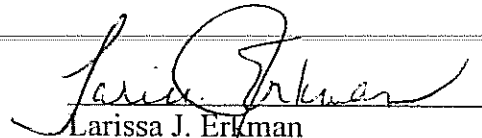
- (d) By submitting a petition for fees for preparation of tax returns for the Bacon Estate and for Ms. Bacon and by collecting a fee for such services when he did not complete the services on behalf of the Estate and when he could not produce the tax returns to the clerk or the successor personal representative, Defendant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c) of the Revised Rules of Professional Conduct.

WHEREFORE, the Plaintiff prays as follows:

1. That disciplinary action be taken against Defendant in accordance with N.C. Gen. Stat. § 84-28(a) and (b) and section .0114 of the Discipline & Disability Rules of the North Carolina State Bar, as the evidence on hearing may warrant;
2. That Defendant be taxed with all costs permitted by law in connection with these proceedings; and
3. For such other and further relief as may be appropriate.

This the 4th day of October, 2000.


James K. Dorsett, III, Chairman
Grievance Committee


Larissa J. Erlman
Attorney for Plaintiff
The North Carolina State Bar
Post Office Box 25908
Raleigh, North Carolina 27611
(919) 828-4620

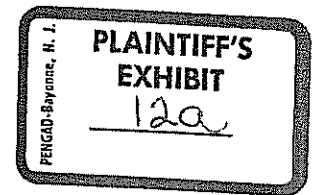
KING CLINIC OF CHIROPRACTIC, PA

19600 W. Catawba Avenue
Cornelius, N.C. 28031
(704)892-0650

REC. NC STATE BAR

OCT 19 1999 4:27

October 18, 1999



N. C. State Bar
Raleigh, NC

Re: Arthur Chillock

Gentlemen:

Gene H. Kendall was retained by Arthur Chillock to represent him with regard to a minor personal injury claim. I treated Mr. Chillock for these injuries. My total bill to Mr. Chillock for treatment related to these injuries was \$1283.00. There was no permanent disability resulting from these injuries.

On July 23, 1998, the day I understand that the settlement proceeds from this case were available and disbursed to Mr. Chillock and Mr. Kendall, I was on vacation. I was the only doctor on staff at the King Clinic of Chiropractic, PA at that time. The office was closed for the duration of my vacation.

Upon return from vacation a play back of messages on my office answering machine included a message from Mr. Kendall that he had settled the Chillock case and that he had my money for him. Mr. Kendall was notified thereafter by telephone by a member of my office staff and promptly came to my office in person and paid the total amount due (\$1285.00) in cash. I was personally present at the front desk in my office when this payment was made.

I trust this answers the questions you may have had about this account. Neither I nor Mr. Chillock ever had any concerns about this account. Mr. Chillock was not billed after the settlement, because my office knew upon return from vacation that Mr. Kendall was holding the funds in question for us.

Sincerely,

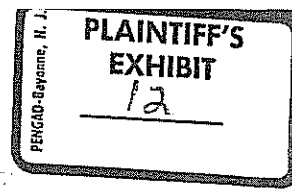
A handwritten signature in cursive script that reads "Mack H. King, DC".

Mack H. King, DC, DABCO

NORTH CAROLINA
MECKLENBERG COUNTY

FILED IN CASE NO. 03-00000000

FILED IN CASE NO. 03-00000000



AFFIDAVIT

I, Mack D. King, being duly sworn, depose and say:

1. I am a doctor of chiropractic. My office is located at 19600 West Catawba Avenue, Suite B101, Cornelius, North Carolina 28031. My office was located at the same address during the period of July through September 1998.

2. I am the only doctor on staff at King Chiropractic Clinic and was the only doctor on staff in July 1998 through September 1998.

3. I treated Arthur Chiluck for injuries related to an accident. Gene H. Kendall was retained by Mr. Chiluck to represent him in a personal injury claim arising out of the accident.

4. My total bill for treating Mr. Chiluck was \$1283.00.

5. Sometime in October 1999, I signed a letter dated October 18, 1999. A copy of the letter is attached hereto and is identified as Exhibit A. This letter is not on my letterhead nor has my office ever used a letterhead like the one that appears on the October 18, 1999 letter.

6. At the time I signed this letter, I believed it to be accurate.

7. I relied solely on my recollection and information supplied to me by Mr. Kendall in determining that the letter's content was accurate.

8. Based on inquiries from the North Carolina State Bar, I recently asked my office staff to pull records in an effort to verify the content of the letter.

9. My office records keep in the normal course of business show that my office was closed for vacation from Saturday, July 18, 1998 to and including Tuesday, July 21, 1998. My office was open during the remainder of that week and thereafter. The entries in these records were made contemporaneous with the events recorded in the records.

10. I seem to recall that there was a message on my answering machine from Mr. Kendall when I returned from vacation after July 21, 1998. The message indicated that Mr. Kendall had settled Mr. Chiluck's personal injury claim and had money to pay my bill.

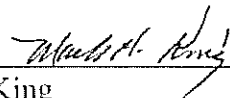
11. I believe that my office staff returned Mr. Kendall's telephone message, as is the customary practice of my office; however, I have no personal knowledge that the call was in fact returned or when it was returned. I have reviewed Mr. Chiluck's medical file and other office records, but have found no records indicating if and when my office staff returned Mr. Kendall's

telephone message. The staff members working in my office in July – September 1998 are no longer employed here at the Clinic.

12. On September 8, 1998, Mr. Kendall personally delivered to my office \$1283.00 in cash in full payment of the services I rendered to Mr. Chiluck.

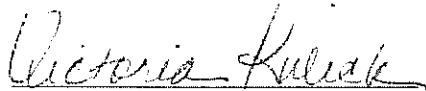
Further affiant sayeth not.

This 22 day of December, 2000



Mack D. King
H. MAIL

Sworn to and subscribed before me
this 22 day of December, 2000.



Notary Public

My Commission expires:

MY COMMISSION EXPIRES 11/24/2004

Gene H. Kendall
Attorney at Law
366 Northwest Drive
Davidson, N.C. 28036
(704)896-0133



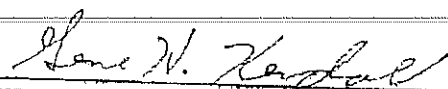
July 21, 1998

SETTLEMENT STATEMENT
P.I. CLAIM OF ARTHUR CHILOCK
DATE OF INJURY: MAY 5, 1998

TOTAL RECOVERY	\$3200.00
MEDICAL BILLS FOR DR. KING (ANY OTHERS TO BE PAID DIRECTLY BY CLAIMANT-COUNSEL DOES NOT HAVE COPIES)	1283.00
COUNSEL FEE (1/3 OF RECOVERY)	1066.66
BALANCE - PAYABLE TO CLAIMANT	\$850.34

REVIEW AND APPROVED:


ARTHUR CHILOCK


GENE KENDALL, ATTORNEY

REC. N.C. STATE BAR
GARRISON MANAGEMENT COMPANY

694 Millswood Drive
Moorestville, N.C. 28036
(704)664-2926

October 18, 1999



N.C. State Bar
Raleigh, N. C.

Gene H. Kendall as asked me to provide information to your auditor about transactions between himself and my management company or myself personally.

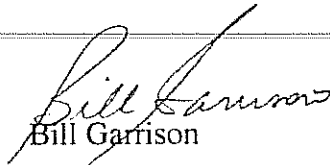
Mr. Kendall has represented my management company, or been retained by me to represent homeowner's associations which I manage, on a number of occasions. The most usual instance has been to file liens upon property where the owners had not paid their homeowners' association dues. In each such instance Mr. Kendall filed the lien upon my request, and after reviewing ledger records of the account and association documents (Charter and Bylaws). After the lien was filed Mr. Kendall brought a filed copy of the lien to my office together with an invoice. Mr. Kendall was usually paid by a check drawn upon an account for the homeowners association. At times the individual who needed to sign such a check (usually the president of the association) would not be available and I would write a personal check to Mr. Kendall and then have him endorse the association check to me when I was later obtained. Filing costs for these liens were not itemized or billed separately. They were paid by Mr. Kendall and then absorbed or included by him in the \$125 which we paid him after the filed lien was delivered to us.

There were times when Mr. Kendall was paid for writing a letter or doing some legal research for us. These payments were according to invoices supplied to us after the work was completed. I do not recall ever paying Mr. Kendall for work done for me personally. Any checks paid him on my personal account were, as stated, for work done for an association and paid to him by me as a matter of convenience. There have been no purchases of property involved in any work done for me or any association owned by me. Mr. Kendall has never held any moneys in trust, nor have I ever advanced money to him for payment of fees. In each case he has done the work, paying any fees, and then been paid for that work when the work product was delivered or very soon thereafter.

Mr. Kendall has always responded promptly to my requests for help. He has consistently refused payment for consultations, either by telephone or in person. Charges to me or associations managed by me have been for specific work which was accomplished when the fee was paid. One partial exception relates to foreclosure actions which were done two or three times for associations managed by my company. In these cases Mr. Kendall prepared and filed the foreclosure documents and brought the filed documents to me with an invoice for a flat charge for the foreclosure. Court costs, which had been paid by Mr. Kendall, were not itemized, but were included in the flat fee of \$900.00. In each case the foreclosure action resulted in collection of the substantial arrearage and the action, when successful, was dismissed. There was no additional charge for the continued pressing of these claims to ultimate success. At least one of these cases required a lot of follow-up attention and I offered Mr. Kendall several times to pay him additional fees for the extra work he was doing. Each time he declined, saying that the original fee was for handling the case, and that he might have a chance to make it up on some other, easier, case. Neither I nor any association managed by me has ever had any monies on deposit with Mr. Kendall. All monies paid to Mr. Kendall have been monies already earned, or fees for work (as in the foreclosure) underway and to be completed as required.

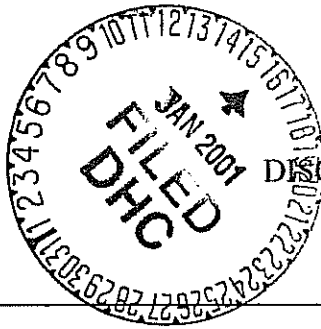
During the past several years I have managed approximately 30 homeowners' associations. I have used Mr. Kendall and other attorneys on a case by case basis. Mr. Kendall has been completely trustworthy in our dealings. He has worked well with me and with officers from the homeowners associations. He has attended homeowners associations meetings when requested and offered valuable advice and support. I have no idea how many hours Mr. Kendall has worked without accepting compensation, even when compensation was offered. I offer my expression of complete trust and of deep appreciation for the services given by Mr. Kendall.

Sincerely,



Bill Garrison

NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
NORTH CAROLINA STATE BAR
00 DHC 25

THE NORTH CAROLINA STATE BAR,)
)
Plaintiff,)
)
v.)
)
GENE H. KENDALL, Attorney,)
)
Defendant.)

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER OF DISCIPLINE

This matter was heard on the 29th day of December 2000, before a Hearing Committee of the Disciplinary Hearing Commission composed of Kenneth M. Smith, Chair; W. Steven Allen, Sr., and Robert B. Frantz. The Defendant, Gene H. Kendall, appeared at the hearing and represented himself. The plaintiff was represented by Larissa J. Erkman.

Based upon the pleadings, including the Stipulations on Pretrial Conference submitted by the parties, and the evidence introduced at the hearing, the Hearing Committee hereby enters the following

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar, is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar promulgated thereunder.

2. Defendant, Gene H. Kendall (hereinafter, "Defendant"), was admitted to the North Carolina State Bar in 1968 and is, and was at all times referred to herein, an attorney at law licensed to practice law in North Carolina, subject to the rules, regulations and Revised Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. During the periods referred to herein, Defendant was engaged in the practice of law in North Carolina and maintained a law office in Davidson, Mecklenberg County, North Carolina.

4. On September 17, 1997, Defendant qualified as executor of the Estate of Rosalie Bacon.

5. As executor of the Bacon Estate, Defendant opened a bank account for the Estate at First Citizens Bank, designated Account Number 0131434338 (hereafter, "Bacon Estate Account").

6. On February 23, 1998, Defendant endorsed and deposited into his personal account at First Citizens Bank, Account Number 137828693 (hereafter, the "Personal Account") two checks payable to the Estate of Rosalie Bacon from Charlotte Psychiatric Associates in the total amount of \$243.86 (hereafter, the "Bacon Estate Funds").

7. Defendant deposited the Bacon Estate Funds into his Personal Account along with two checks payable to him from his mother, Bessie Kendall, in the total amount of \$500.00.

8. Defendant deposited the Bacon Estate Funds and the checks from his mother into his Personal Account on February 23, 1998 when his account balance was negative \$25.21.

9. As of February 23, 1998, Defendant was not owed any sum from the Bacon Estate in compensation of his fees or in reimbursement of expenses incurred on behalf of the Estate. Defendant's fees and expenses approved by the Clerk of Court in the Bacon Estate had been fully paid as of November 12, 1997.

10. On June 2, 1998, Defendant's Personal Account had a negative balance.

11. During the period from February 23, 1998 when he deposited the Bacon Estate Funds into his Personal Account to June 2, 1998, the Defendant's Personal Account balance repeatedly fell below \$243.86.

12. Throughout the period February 23, 1998 to June 2, 1998, Defendant used the funds in his Personal Account for personal expenditures.

13. On January 25, 1999, Defendant made a deposit of his personal funds in the amount of \$360.50 into the Bacon Estate Account.

14. Defendant deposited his personal funds into the Bacon Estate Account after he was notified that the North Carolina State Bar had initiated a grievance investigation regarding his conduct in handling the Bacon Estate.

15. Defendant deposited his personal funds into the Bacon Estate Account on January 25, 1999 to replace Estate funds that he knew he had deposited into his Personal Account on February 23, 1998. However, Defendant did not know the amount of Estate funds he had deposited in February 1998 and did not recall the source of the Estate funds. He believed that funds payable to the Bacon Estate from the Methodist Home in the

amount of \$360.50 had not been properly deposited into the Bacon Estate Account and therefore made a deposit of his personal funds to the Bacon Estate Account in that amount.

16. Defendant formerly maintained a trust account at United Carolina Bank (now known as BB&T), Account Number 5216583347 (hereafter, the "Old Trust Account").

17. Defendant's Old Trust Account was closed on July 16, 1998.

18. Defendant represented Arthur Chiluck in a personal injury claim.

19. On July 21, 1998, Mr. Chiluck reviewed and signed a settlement statement prepared by Defendant (hereafter, the "Chiluck Settlement Statement").

20. The Chiluck Settlement Statement shows a total recovery for the benefit of Mr. Chiluck in the amount of \$3,200.00.

21. The Chiluck Settlement Statement also shows that Defendant retained \$1,283.00 of the settlement funds on behalf of Mr. Chiluck for payment of medical bills owed by Mr. Chiluck to Dr. King of King Chiropractic Clinic.

22. The Chiluck Settlement Statement shows that Defendant received \$1,066.00 of the settlement funds as his attorney's fee.

23. On July 21, 1998, Defendant disbursed to Mr. Chiluck the remaining balance of the settlement funds in the amount of \$850.34 by check number 1532 issued from Defendant's Personal Account.

24. On July 22, 1998, Defendant endorsed a check made payable to "Arthur Chiluck and His Attorney Gene H. Kendall" from Nationwide Insurance Company in the amount of \$3,200.00 and deposited the check into his Personal Account.

25. Upon deposit of the Chiluck settlement check into his Personal Account, Defendant simultaneously withdrew \$1,000.00 in cash.

26. On September 8, 1998, Defendant paid to King Chiropractic Clinic \$1,283.00 in cash in full payment of Mr. Chiluck's outstanding medical bill.

27. On July 30, 1998, the balance in Defendant's Personal Account fell below \$1,283.00 and remained below \$1,283.00 up to and including September 8, 1998.

28. Between July 22, 1998 when Defendant deposited the Chiluck settlement check into his Personal Account and September 8, 1998 when Defendant paid King Chiropractic Clinic, Defendant's Personal Account balance fell as low as \$1.96.

29. On September 4, 1998, Defendant had only \$51.83 in his Personal Account.

30. On August 24, 1998, Defendant withdrew \$25.00 from his account by ATM transaction. Defendant made no cash withdrawals from his account between August 24, 1998 and September 8, 1998 when he paid King Chiropractic Clinic. On September 8, 1998, Defendant deposited \$200.00 in cash to his Personal Account.

31. Between July 22, 1998 and September 8, 1998, Defendant used the funds in his Personal Account for personal expenditures.

32. On April 6, 1999, Investigator David Frederick of the North Carolina State Bar personally served a subpoena for cause audit on Defendant, commanding him to produce for inspection, copy and audit all records relating to his handling of client funds that he was required to keep pursuant to the Rules of Professional Conduct, Rules 10.1 and 10.2, and/or the Revised Rules of Professional Conduct, Rules 1.15-1 and 1.15-2.

33. At the time the subpoena for cause audit was served on him, Defendant explained that he had not maintained a trust account for deposit of client or fiduciary funds since his Old Trust Account was closed on July 16, 1998.

34. Defendant opened a new trust account (hereafter, "the New Trust Account") in or around June 1999 in response to the State Bar's investigation.

35. During the period from July 16, 1998, to June 1999, Defendant did not maintain any trust account for the deposit of client or fiduciary funds.

36. On June 30, 1998, Defendant deposited into his Personal Account settlement funds in the amount of \$572.00 that he received from Laker Express on behalf of his clients, Garrison Management and Portside Homeowners' Association.

37. Defendant was entitled to an attorney's fee equal to one-third of the settlement amount or \$190.66.

38. Defendant disbursed \$381.34 of the settlement funds to Portside Homeowners' Association by issuing check number 1530 from his Personal Account. The check was dated July 3, 1998. The amount of \$381.34 paid by Defendant to Portside Homeowner's Association equaled the settlement proceeds less Defendant's attorney's fee.

39. Rosalie Felicia Bacon died on June 25, 1996.

40. Ms. Bacon's last will and testament was probated on September 17, 1997.

41. At the same time, Defendant applied to be executor of the Bacon Estate and completed a preliminary inventory. He also filed inventories of the contents of two safety deposit boxes.

42. Defendant qualified as the executor for the Bacon Estate pursuant to the terms of Ms. Bacon's last will and testament and the Mecklenberg County Superior Court issued letters testamentary to Defendant on September 17, 1997.

43. Defendant signed the Oath of Executor on September 17, 1997.
44. After Defendant qualified as executor, he set up a separate estate account and collected the funds held in trust for Ms. Bacon at First Citizens Bank. He also paid bills of the Estate.
45. On October 6, 1997, Defendant filed a 90-day inventory for Bacon's estate and a verified petition for interim fees for executor.
46. The verified petition for interim fees sought payment of Defendant's fees as executor in the amount of \$2,212.50.
47. The Clerk of Mecklenberg County Superior Court entered an order allowing compensation of Defendant as executor of the Bacon Estate in the amount of \$2,212.50.
48. On October 31, 1997, Defendant filed an affidavit of publication, which affirmed that the notice of administration of the Bacon Estate had been published.
49. On November 10, 1997, Defendant filed a second verified petition for interim fees for serving as executor.
-
50. The second petition for interim fees sought payment of Defendant's fees as executor in the amount of \$2,125.00.
51. The second petition for interim fees included a statement of Defendant's time incurred in administering the Bacon Estate.
52. The statement of Defendant's time incurred in administering the Bacon Estate included an entry for 5.0 hours for preparation of NC State Inheritance Tax Return for the Estate and preparation of an income tax return for the decedent for the tax year 1996.
-
53. On November 10, 1997, the Clerk of Mecklenberg County Superior Court entered an order allowing compensation of Defendant as executor of the Bacon Estate in the amount of \$2,125.00.
54. Subsequently, there was no activity in the file until September 18, 1998, at which time the Clerk of Mecklenberg County issued a Notice to File Annual Account.
55. Pursuant to this Notice to File Annual Account, Defendant was advised that he must file an annual accounting on behalf of the Bacon Estate no later than October 18, 1998.
56. The Notice to File Annual Account was served on Defendant by certified mail on September 22, 1998.

57. Defendant did not file an Annual account for the Bacon Estate by October 18, 1998.

58. The Mecklenberg County Clerk spoke with Defendant on October 27, 1998 and informed him that, if he had not filed an accounting by November 13, 1998, the clerk's office would issue an order to file an accounting and would send a copy of the order to the North Carolina State Bar.

59. On November 16, 1998, Defendant requested an extension of time to file an Annual Account and the Clerk of Mecklenberg County granted an extension to November 19, 1998.

60. Thereafter, Respondent failed to file an annual accounting or inventory.

61. On December 4, 1998, the Assistant Clerk of Superior Court, Kathy Allen Smith, issued an order for Defendant to file an accounting in the Bacon Estate.

62. Pursuant to the Order, Respondent had to and until December 24, 1998 to file an annual account or to show good cause as to his failure to do so.

63. Three attempts to serve the December 4, 1998 order on Defendant by certified mail were made, but the certified mail delivery was not claimed by Defendant.

64. Defendant did not file an annual inventory or account for the Bacon Estate and did not make the required showing.

65. Defendant did not seek another extension of time to file an annual account.

66. By order dated January 8, 1999, the Mecklenberg County Clerk removed Defendant as executor of the Bacon Estate and the letters testamentary were revoked.

67. The Clerk found as fact that Defendant "failed to properly administer the estate . . . in that he has failed to file his Account as required by law."

68. The Clerk found as fact that the Court had taken actions in an attempt to have Defendant correct the deficiencies in that:

- (a) Assistant Clerk Kathy Allen Smith talked by telephone with Defendant on several occasions and each time was advised by Defendant that he would file his Account;
- (b) Ms. Smith advised Defendant that if he had not filed his Account by November 13, 1998, the Court would issue an order to file his Account;
- (c) On December 4, 1998, the Court issued an order and directed Defendant to file his Account as required by law which order the Court attempted to serve on Defendant by certified mail, return receipt requested;

- (d) The wrapper containing the order to file was returned to the Court;
- (e) The wrapper discloses that notices to pick up the certified mailing were given to the addressee on December 8, December 18, and December 23, 1998.
- (f) The mail was not picked up by Defendant and the post office returned it to the Court with the notation that it was "unclaimed."

67. The public administrator, Frank Schrimsher, was appointed as Successor Personal Representative for the Bacon Estate on January 8, 1999.

68. Defendant was ordered to immediately turn over to the public administrator all assets of the Bacon Estate and all records pertaining to administration of the Estate.

69. On January 12, 1999, the Successor Personal Representative, Mr. Schrimsher, filed a petition for discovery of property belonging to the Bacon Estate.

70. By notice of hearing dated January 12, 1999, Defendant was ordered to appear before the Clerk of Superior Court of Mecklenberg County on February 16, 1999, to be examined under oath concerning his possession of certain property belonging to the Estate.

71. On January 26, 1999, Assistant Clerk of Court Kathy Allen and Mr. Schrimsher met with Defendant regarding the Bacon Estate.

72. At their January 26, 1999 meeting, Ms. Allen and Mr. Schrimsher pointed out to Defendant that his second verified petition for payment of executor fees stated that he had spent 5.0 hours at \$125.00 per hour preparing inheritance tax returns for the Estate and personal income tax returns for Ms. Bacon.

73. Ms. Allen and Mr. Schrimsher asked Defendant whether the tax returns had been filed.

74. Defendant admitted that he did not file the tax returns.

75. Defendant's fee for preparing the tax returns in the amount of \$625.00 was paid by the Estate on November 12, 1997 by Defendant's issuance of a check from the Bacon Estate Account to himself in the amount of \$2,125.00.

76. Defendant had not filed the tax returns by the time he filed his second verified fee petition with the court.

77. Defendant had not filed the tax returns by the time he issued a check from the Bacon Estate in payment of his fees on November 12, 1997.

78. Defendant lost his Bacon Estate file containing the tax returns on or around February 23, 1998 when he traveled to Clinton, North Carolina to visit his mother. He had not filed the tax returns as of the date he lost his file.

79. At the January 26, 1999 meeting with Ms. Allen and Mr. Schrimsher, Defendant filed an affidavit with the Court describing the assets in the Estate at the time of Ms. Bacon's death and the actions that he had undertaken as executor up to and including January 8, 1999, when he was removed as executor by order of the Court.

80. Defendant prepared and attached to his affidavit filed on January 26, 1999, a list of checks payable to the Bacon Estate and a list of checks paid from the Bacon Estate Account.

81. The list of checks payable to the Bacon Estate did not include the two Charlotte Psychiatric Associates checks in the total amount of \$243.86 that Defendant deposited into his Personal Account on February 23, 1998.

82. At the January 26, 1999 meeting with Ms. Allen and Mr. Schrimsher, Defendant promised to turn over records for the Estate as soon as he received them from the bank and promised to prepare a final account.

83. The Assistant Clerk of Court, Ms. Allen, gave Defendant an extension of 7 – 10 days to turn over the Estate records and to prepare an account.

84. Defendant did not turn over the documents or file an account.

85. On May 11, 1999, the Court issued a Notice of Hearing and scheduled a hearing on May 27, 1999, for purposes of determining the Defendant's attorney's fee.

86. Defendant met with Mr. Schrimsher and Assistant Clerk of Court, Martha Curran, on May 27, 1999.

87. At that meeting, Defendant returned \$650.00 to the Estate in reimbursement for the \$625.00 in fees paid to him for preparing the tax returns that were never filed and were never turned over to the new administrator.

88. On October 6, 1999, Defendant finally filed a Final Account for the Bacon Estate.

Based upon the foregoing Findings of Fact and the stipulations of the parties, the Hearing Committee enters the following

CONCLUSIONS OF LAW

1. All parties are properly before the Hearing Committee. The Committee has jurisdiction over the Defendant, Gene H. Kendall, and the subject matter of this proceeding.

2. The Defendant's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) as follows:

- (a) By appropriating to his own use the Bacon Estate Funds that he received in a fiduciary capacity, Defendant committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 8.4(b) of the Revised Rules of Professional Conduct.
- (b) By appropriating to his own use the Bacon Estate Funds that he received in a fiduciary capacity, Defendant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c) of the Revised Rules of Professional Conduct.
- (c) By failing to preserve the Bacon Estate Funds that he received in a fiduciary capacity separate and apart from his own funds in a trust or fiduciary account, Defendant violated Rules 1.15-1(a) and 1.15-1(d) of the Rules of Revised Professional Conduct.
- (d) By failing to preserve the Chiluck settlement funds that he received in a fiduciary capacity separate and apart from his own funds in a trust or fiduciary account, Defendant violated Rules 1.15-1(a) and 1.15-1(d) of the Revised Rules of Professional Conduct.
- (e) By failing to promptly pay or deliver to King Chiropractic Clinic settlement funds belonging to Mr. Chiluck for medical expenses owed, as directed by Mr. Chiluck in the Chiluck Settlement Statement, Defendant violated Rule 1.15-2(h) of the Revised Rules of Professional Conduct.
- (f) By failing to preserve the funds of his clients Garrison Management and Portside Homeowners' Association that he received in a fiduciary capacity separate and apart from his own funds in a trust or fiduciary account, Defendant violated Rules 1.15-1(a) and 1.15-1(d) of the Revised Rules of Professional Conduct.
- (g) By failing to maintain a trust account, separately identifiable from any business or personal account, as a prerequisite to the receipt of funds belonging to another person or entity from a client or a third party, Defendant violated Rule 1.15-1(c) of the Revised Rules of Professional Conduct.

- (h) By failing to act with reasonable diligence and promptness in completing the statutorily required estate filings and tasks, Defendant neglected his duties and obligations as executor of the Bacon Estate in violation of Rule 1.3 of the Revised Rules of Professional Conduct.
- (i) By unduly delaying the estate proceedings and by failing to respond to and abide by the orders of the Superior Court relating to administration of the estate, Defendant engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) of the Revised Rules of Professional Conduct.
- (j) By submitting a petition for fees for preparation of tax returns for the Bacon Estate and for Ms. Bacon and by collecting a fee for such services when he did not complete the services on behalf of the Estate, Defendant knowingly made a false statement of material fact or law to a tribunal in violation of Rule 3.3(a) of the Revised Rules of Professional Conduct.
- (k) By submitting a petition for fees for preparation of tax returns for the Bacon Estate and for Ms. Bacon and by collecting a fee for such services when he did not complete the services on behalf of the Estate, Defendant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c) of the Revised Rules of Professional Conduct.

3. The Hearing Committee found no other rule violations as alleged in the Complaint.

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the evidence and arguments of the parties concerning the appropriate discipline, the Hearing Committee hereby makes additional

FINDINGS OF FACT REGARDING DISCIPLINE

1. The Defendant's misconduct is aggravated by the following factors:
 - (a) Prior disciplinary offenses: In 1990, Defendant received a reprimand for violation of Rules 6(b)(3) and 7.1(a)(1) of the Rules of Professional Conduct when he delayed in filing an equitable distribution order on behalf of his client for 17 months after the equitable distribution hearing as a self-help remedy to collect a fee. In 1995, the Defendant's license was suspended for six months by the Disciplinary Hearing Commission

based on findings that that, among other things, the Defendant engaged in the practice of law while his license was administratively suspended and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of 1.2(c) by knowingly making a false statement of material fact in connection with the disciplinary investigation. A letter of warning was issued to the Defendant in 1998, for continuing to practice law after he received an order suspending his license for failure to pay dues.

- (b) Dishonest or selfish motive.
- (c) A pattern of misconduct.
- (d) Multiple offenses.
- (e) Substantial experience in the practice of law.

2. The Defendant's misconduct is mitigated by the following factors:

- (a) Timely good faith efforts to make restitution or rectify consequences of misconduct.
 - (b) Full and free disclosure to the Hearing Committee or cooperative attitude toward the proceedings.
 - (c) Remorse.
-

3. The aggravating factors outweigh the mitigating factors.

Based upon the foregoing aggravating and mitigating factors and the arguments of the parties, the Hearing Committee hereby enters the following

ORDER OF DISCIPLINE

1. The Defendant is hereby disbarred from the practice of law, effective 30 days from the date of service upon him of this Order of Discipline.

2. The Defendant shall submit his license and N.C. State Bar membership card to the Secretary of the N.C. State Bar within 30 days of service upon him of this order.

3. The Defendant shall comply with all provisions of 27 N.C. Admin. Code Chapter 1B, § .0124 of the N.C. State Bar Discipline & Disability Rules, including, but not limited to, the requirement that he file, with the Secretary of the N.C. State Bar within 10 days of the effective date of this order, an affidavit showing that he has fully complied with the provisions of this Order, the provisions of §.0124 and with the provisions of other state, federal or administrative jurisdictions, if any, to which he is admitted to practice.

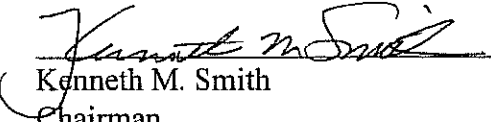
4. The Defendant shall violate no provisions of the Rules of the North Carolina State Bar during his disbarment.

5. The Defendant shall violate no state or federal law during his disbarment.

6. The costs of this matter are taxed against the Defendant

Signed by the undersigned chairman with the full knowledge and consent of the other members of the Hearing Committee, this the 12 day of

January, 2001.


Kenneth M. Smith
Chairman
Hearing Committee

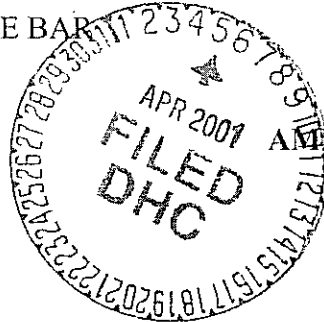
STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
DISCIPLINARY HEARING COMMISSION
NORTH CAROLINA STATE BAR
00 DHC 25

THE NORTH CAROLINA STATE BAR
Plaintiff,

vs.

GENE H. KENDALL, Attorney,
Defendant.



**MOTION FOR
AMENDMENT OF JUDGMENT**

COMES NOW THE DEFENDANT, pursuant to Rules and Regulations of the NC State Bar, Section .0114(2)(A and B), and moves the hearing committee in this case to amend its Findings of Fact, Conclusions of Law and Order of Discipline in this case because (a) some important findings of fact are not supported by competent evidence and (b) upon appropriate findings of fact the conclusions of law and order of discipline do not follow and are inappropriate.

FINDINGS OF FACT ALLEGED TO BE IN ERROR

THE DEFENDANT respectfully submits that the following findings of fact are not supported by the evidence in this case:

1. Findings of fact 27, 28, 29, 30, and 31 are irrelevant to this case, since the bank records which are in evidence in this case make it absolutely clear that the defendant was not dependant upon funds in this account for payment of the bill due from Arthur Chiluck to Dr. Mack King. The bank record, and the uncontradicted testimony of the defendant make it clear that these funds were never deposited into this account and were never withdrawn from it.

THE DEFENDANT respectfully submits that additional exculpatory findings should have been made in order that this order reflect fairly the truth of this case. These findings are as follows:

1. That promptly upon qualification as executor of the Bacon Estate the defendant paid all outstanding bills of the estate.

2. That the defendant filed a timely 90 day inventory in the Bacon Estate which accurately reflected all assets in the estate, including the \$243.00 check fro Charlotte Psychiatric Associates which had at that time been returned to Charlotte Psychiatric Associates as a stale check and awaited replacement.

3. That upon receipt of the replacement check from Charlotte Psychiatric Associates the defendant placed this check into his personal checking account. This was a violation of the rules of the NC State Bar which the defendant has freely and clearly admitted. All other funds in

this estate were at all times properly deposited in a separate Bacon Estate Trust Account, and totaled more than \$21,000.00.

4. When the defendant made the very tardy accounting to the clerk of court for the Bacon Estate it was evident that the \$243.00 check from Charlotte Psychiatric Associates had been listed on the 90 day inventory and that funds somewhat greater than this had been mistakenly placed into the account by the defendant. At the time of audit of this account by the NC State Bar there were no shortages. In fact, there was slightly more money in this account than required because the defendant made a mistake about which check he needed to replace and made a double deposit of a different, slightly larger, check.

5. Although there was a violation of the strict prohibition against mixing of trust and personal funds, the actions of the defendant in this case make it clear that (a) the \$243 was at all times acknowledged and was never "hidden" (b) that even in the modest financial circumstances clear in this record, \$243 was not such an amount as placed in any real jeopardy the security of the funds of this estate.

6. Upon settlement of the Chilock claim the defendant took the settlement check and a settlement sheet to the defendant. The client signed the check and the settlement sheet, and was given a check for his share of the proceeds drawn upon the personal account of the defendant. This check cleared upon presentation and the client was never in any danger of losing any funds.

7. The funds due to Dr. Mack King were never deposited into any bank account. Immediately upon deposit of the Chilock check, and the withholding of \$1000.00 in cash, the defendant went to the office of Dr. Mack King to pay the funds due him, \$1283.00. Dr. Mack King was on vacation and his office was closed. The defendant returned to his home and immediately called the office of Dr. King to report that he had Dr. King's money and to request a phone call when the doctor returned from vacation, so that the money could be delivered. Upon the return of Dr. King from vacation a member of his staff called the defendant (approximately five weeks later) and the defendant reported to Dr. King's office and paid the entire amount due within one hour. No withdrawals from any bank account were made to fund this disbursement.

8. The legal representative of the NC State Bar made some point of the fact that letters to the Bar, admitted into evidence in this case, had been prepared by the defendant for signature by Mr. Bill Garrison and by Dr. Mack King. She allowed her investigator to testify upon cross-examination that the affidavit of Dr. Mack King, on the other hand, had been prepared by Dr. Mack King. The witness may have believed this to be true. The legal representative, who allowed this testimony to mislead without correction, knew it to be mistaken. This affidavit of Dr. Mack King was prepared by counsel for the NC State Bar and was corrected twice thereafter before Dr. Mack King signed it. The Hearing Committee should have been made aware of this fact, particularly since so much had been made of the acknowledged fact that the letters were prepared by the defendant.

9. When the defendant settled the claim for Portside Homeowners' Association he tendered the check for the entire proceeds to the property manager, along with a settlement sheet. At the request of the property manager, he gave the property manager a check for the portion of

that recovery due to Portside and then deposited the check for the gross proceeds into the personal account upon which the one check of disbursement was drawn. The check for disbursement cleared upon presentation.

10. No client or beneficiary of legal services in this case has brought any complaint. The record does not show that Arthur Chiluck even knows of any alleged problem. Dr. Mack King has made it abundantly clear that he has no complaint, as has Property Manager, Bill Garrison. The creditors of the Bacon Estate were paid immediately and the ultimate beneficiary, an educational charity, received its appropriate bequest with diminution and without any realistic threat of diminution.

11. Nothing found in the careful investigation and audit of the defendant's personal, business and trust accounts revealed any missing funds or any need for restitution.

12. At no time during the service of the defendant as an attorney in the State of North Carolina, since 1969, has there been any complaint from a client indicating mishandling of or shortage of client funds.

CONTESTED CONCLUSIONS OF LAW

(a) This finding is inappropriate in view of the defendant's having listed the check in question in the 90 day inventory, having deposited more than \$21,000 appropriately in a Bacon Estate Trust Account, and in view of the size of the check which was commingled.

(b) There was a commingling of funds. Findings of dishonesty, fraud, deceit or misrepresentation are without foundation in this case, in which the small check in question was listed on the 90 day inventory and was deposited into the estate account before the final accounting.

(e) The unchallenged evidence in this case is that the defendant IMMEDIATELY tendered to Dr. Mack King the funds due him by taking them to the King office and by leaving a message on the King telephone answering machine that the funds were available. It is inappropriate to conclude that there was a failure to pay promptly when there is no evidence whatever to contradict the testimony that there was an IMMEDIATE tender.

(j and k) While it is acknowledged in stipulations that the tax returns for the Bacon Estate were not filed, and that the fees collected for preparation of these returns were returned voluntarily, in an amount exceeding the amount claimed by the successor administrator by \$25 or \$50, there is no evidence to contradict the testimony of the defendant that he had prepared the returns and that they were lost, along with other key portions of the Bacon Estate file such as the record of deposits into the trust account.

CONTESTED FINDINGS OF FACT REGARDING DISCIPLINE

There are a number of findings of fact in this section which the defendant truly believes to be in error. Some of them, however, are supported by at least some of the evidence. The defendant contends that the following are not supported by evidence:

1. (b) The defendant never hid the existence or the location of any of the funds in question. The only gain possible to the defendant was the value of a "loan" for \$243 over a period approaching two years, the "loan" of \$381.34 for four days (the funds were at all times in the personal account of the defendant and clearly were not used for personal use or gain) and the "loan" of \$1283 for 56 days (there is no showing that these funds were commingled or that they were ever used for personal purpose). There was never a client complaint in any of these matters and never a failure to pay the correct amount in each case to or for the client.

1. (C and d) The defendant contends that the record in this case does not show a pattern of misconduct. The three cases involved are each very different from the others and are all very distinct from the defendant's three decades of law practice. Even in the instant cases, the failures are not material and did not present any real possibility either of gain to the defendant or of loss to the client.

EXCEPTIONS TO THE ORDER OF DISCIPLINE

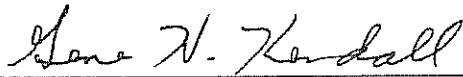
The order of disbarment in this case far exceeds the level of punishment ever given any similarly situation defendant. The cases cited by counsel for the NC Bar as in support of this punishment all involve one or more important factors not present here. Those cases include a number in which far greater amounts than are involved here were missing and were replaced after an audit, apparently triggered by client reports of shortages. In some of these cases an order of disbarment was suspended or an order of suspension was ordered rather than an order of disbarment. The disbarment of the defendant was not responsive to any alleged or discovered danger to clients. It was not in response to any fraud, deceit, or theft. It was triggered by a reasonable fear on the part of a responsible clerk of court that substantial estate funds may have been spent or otherwise misappropriated. These funds were found all to be in place. Further, all except \$243 of the estate funds which exceeded \$21,000 had at all times been properly in place in a Bacon Estate Account. While it is apparent that the \$243 was commingled and used for personal purposes, it is equally true that the evidence shows no indication that the funds in the two other cases before the committee were commingled or used for personal purposes. In the Chilock case there is only speculation that the funds held for Dr. Mack King may have been used during some 56 days for personal purposes. The evidence is all to the contrary. In the Portside case the evidence is absolutely clear that the funds, while commingled, were never used for personal purposes and were withdrawn in four days.

The defendant in this case was open and cooperative during the investigation and throughout the hearing in this case. There was no indication of any reluctance to bring his practice into strict compliance with the rules of the NC Bar. There was no indication that he felt the rules unreasonable or improper, or that he held himself in any way above these rules. There having been no injury or threat of injury to clients in the cases before the committee, or in any

other client matters involving this attorney, it was not necessary to disbar the defendant to protect clients or the reputation of the NC State Bar.

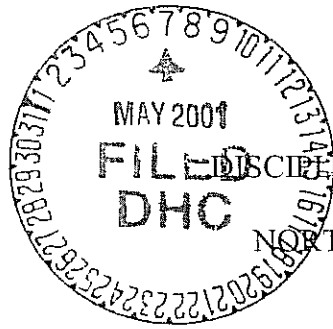
The defendant contends that the taking of his primary source of support for himself and the taking from the community of the services of this attorney, who has been selfless in his service to worthy clients for four decades, is not in the best interest of the community which this defendant serves and is not in the best interest of the NC State Bar. It is seriously contended that, while rules violations have been clearly defined and acknowledged, the punishment in this case is cruel and unusual punishment such as to be Constitutionally prohibited.

Respectfully submitted, this the 4th day of April, 2001.



Gene H. Kendall, Defendant
366 Northwest Drive
Davidson, NC 28036
(704)896-0133

WAKE COUNTY
NORTH CAROLINA



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
00 DHC 25

THE NORTH CAROLINA STATE BAR,
PLAINTIFF,

v.

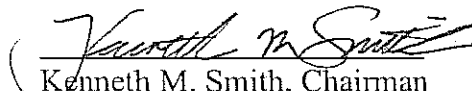
GENE H. KENDALL, ATTORNEY
DEFENDANT.

**ORDER DENYING MOTION FOR
AMENDMENT OF JUDGMENT**

This matter comes before the Chairman of the Hearing Committee of the Disciplinary Hearing Commission, Kenneth M. Smith, pursuant to the defendant Gene H. Kendall's Motion for Amendment of Judgment ("Motion"). Based upon the DHC Hearing Committee's review of the defendant's Motion and the facts and conclusions of law supporting the DHC Hearing Committee's decision in this matter, the DHC Hearing Committee DENIES the defendant's Motion.

Signed by the undersigned Hearing Committee chair with the consent of the other Hearing Committee members.

SO ORDERED this the 4 day of May, 2001.


Kenneth M. Smith, Chairman
DHC Hearing Committee